

JERRY ALLEN §  
v. § CIVIL ACTION NO. 6:08cv482  
KEVIN WHEAT, ET AL. §

The Plaintiff Jerry Allen, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Allen complained that various prison officials were deliberately indifferent to his safety. After review of the pleadings and Allen's testimony at an evidentiary hearing, the Magistrate Judge issued a Report allowing Allen to proceed with his claims against a number of defendants, but recommending dismissal of the defendants Warden Wheat, Major Delarosa, T.C. Hendrix, Joanie Barron, and Susan Bauer. Allen filed objections to the Report of the Magistrate Judge on October 12, 2010.

In his objections, Allen argues generally that Wheat, Delarosa, and Barron knew or should have known of the danger in which he says that he was in, because they should have read the reports and other information. He did not contest the recommendation to dismiss Hendrix and Bauer.

As the Magistrate Judge correctly observed, the Supreme Court has explained that

[A] prison official cannot be held liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. ...

But an official's failure to alleviate a significant risk which he should have perceived, but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Farmer v. Brennan, 511 U.S. 825, 837-38, 114 S.Ct. 1970, 1979 (1994).

Allen's contentions that Wheat, Delarosa, and Barron should have read the reports, and should have known that he was in danger, are in effect complaints about these officials' failure to alleviate a significant risk which they should have perceived but did not, which failure the Supreme Court has stated does not amount to deliberate indifference.

Allen also complains that these Defendants failed to use their positions of authority to take the action he believed proper. The Magistrate Judge correctly stated that *respondeat superior* is not a proper basis for liability in a Section 1983 action, and that Allen had failed to show any basis for supervisory liability on the part of these Defendants. Allen's objections are without merit.

The Court has conducted a careful *de novo* review of the pleadings and testimony in this cause, including the Report of the Magistrate Judge and the Plaintiff's objections thereto. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are overruled and the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the Plaintiff's claims against Warden Wheat, Major Delarosa, T.C. Hendrix, Joanie Barron, and Susan Bauer are hereby DISMISSED with prejudice as frivolous and for failure to state a claim upon which relief may be granted. These Defendants are hereby DISMISSED as parties to this lawsuit. The dismissal of these claims and parties shall have no effect upon the remaining claims and parties in the case. It is further

ORDERED that the dismissal of these claims and parties shall not count as a strike for purposes of 28 U.S.C. §1915(g).

**So ORDERED and SIGNED this 25th day of October, 2010.**

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS**  
**UNITED STATES DISTRICT JUDGE**